

GERALD DEE FOSTER

IBLA 89-142

Decided July 12, 1990

Appeal from a decision of the Idaho State Office, Bureau of Land Management, holding that a cash bond posted under Prospecting Permit No. I-20528 was forfeited.

Affirmed.

1. Mineral Leasing Act for Acquired Lands: Generally

When a permittee fails to reclaim the land after expiration of the prospecting permit, BLM may undertake reclamation activities and seek reimbursement from the bond required by the regulations found at 43 CFR Part 3500, which is conditioned upon compliance with all terms and conditions of the prospecting permit.

APPEARANCES: Gerald Dee Foster, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Gerald Dee Foster (Foster) has appealed from an October 31, 1988, decision of the Idaho State Office, Bureau of Land Management (BLM), holding that the cash bond posted by Foster was forfeited as a result of Foster's failure to complete the required reclamation work to be carried out under Prospecting Permit No. I-20528.

Prospecting Permit No. I-20528 was issued to Foster effective December 1, 1985, for a term of 2 years. Under the terms and conditions of this permit, Foster was granted the right to prospect for gold, silver, platinum, mercury, and associated minerals on 332.5 acres of acquired lands in Idaho County, Idaho.  
1/ The lands subject to the permit were in the

1/ The lands were described as:

"T. 29 N., R. 4 E., B.M., Idaho.

"sec. 14, SE $\frac{1}{4}$  SW $\frac{1}{4}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$ , SW $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$ , W $\frac{1}{2}$  E $\frac{1}{2}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$ , W $\frac{1}{2}$  SW $\frac{1}{4}$

"sec. 15, E $\frac{1}{2}$  SE $\frac{1}{4}$  SE $\frac{1}{4}$

"sec. 22, E $\frac{1}{2}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$ , E $\frac{1}{2}$  E $\frac{1}{2}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$

"sec. 23, SE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$ , S $\frac{1}{2}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$

NE $\frac{1}{4}$ , W $\frac{1}{2}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  SW $\frac{1}{4}$ , N $\frac{1}{2}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$ , N $\frac{1}{2}$  SE $\frac{1}{4}$

Nez Perce National Forest, and a standard form stipulation for lands under the jurisdiction of the Department of Agriculture was executed by Foster, attached to, and made a part of the prospecting permit. Under the terms of section (4) of this stipulation, Foster was to control surface runoff, and under the terms of section (10) of the same stipulation Foster was to comply with the Department of Agriculture rules and regulations applicable to the Nez Perce National Forest.

An additional standard form stipulation, made a part of the permit, included a requirement that Foster file a \$1,000 bond for the use and benefit of the United States. The stated purpose for the bond was to insure surface and subsurface reclamation. By decision dated November 26, 1985, BLM accepted a \$1,000 personal check as a sufficient bond, and noted that the funds would be retained until the terms and conditions of the prospecting permit were fulfilled.

Foster also held a number of unpatented mining claims adjacent to the lands subject to the prospecting permit. On December 8, 1986, Fosco Mining Company (Fosco) filed a mining plan for the year 1987, in accordance with applicable regulations promulgated by the Agriculture Department. 2/ This plan called for a hand mining operation, processing 2 to 3 yards of placer material per day. The property listed in and made subject to the mining plan included the land subject to the prospecting permit.

The mining plan, as approved on January 14, 1987, contained two changes from the plan submitted. The first change involved section F, which called for a description of structures and improvements required to support the operation. Fosco had proposed living quarters, an office, a washhouse, a bunkhouse, lab facilities, and a maintenance shed. In order to gain approval of the plan, section F was amended to allow a lab and processing shed, tool and equipment storage shed, a loading and fuel storage dock, a tool trailer, and a tent trailer for periodic overnight camp-ing. The second change was the addition of a document described as the Brown Creek Road Maintenance Plan, calling for maintenance of the road, and drainage ditches, culverts, and cross-drains.

In a cover letter, dated January 13, 1987, the District Ranger noted the various areas of primary concern to him, which included the necessity for Foster to move his living quarters and partially completed bathhouse from the property described in the mining plan. Fosco was given until

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fn. 1 (continued)

SW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub>, E<sup>1</sup>/<sub>2</sub> NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>, E<sup>1</sup>/<sub>2</sub> W<sup>1</sup>/<sub>2</sub>

NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>, SW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>, N<sup>1</sup>/<sub>2</sub>

SW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>, SE<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>."

2/ Foster signed the mining plan as President of Fosco. No assignment of either the prospecting permit or the bond was filed, and the permit remains in Foster's name.

June 1, 1987, to come into compliance with section F of the mining plan.

On June 16, 1987, the District Ranger moved the date for compliance to July 1, 1987, to allow Foster to complete moving his trailer and other living facilities from the lands subject to the approved plan of operations. On July 9, 1987, the Forest Service gave notice of noncompliance to Foster and Fosco because the living facilities had not been removed from the claims. Compliance was ordered by July 20, 1987.

On July 30, 1987, an additional noncompliance notice was sent to Foster and Fosco. This notice was issued because of the failure to carry out the necessary road maintenance called for in the mining plan. The Acting District Ranger noted concern that "failure to complete this work has allowed continuing erosion to occur on the road. Recent heavy rains have caused severe rutting and erosion to occur in the road-way. This necessitates immediate action to rehabilitate the road and prevent further damage" (July 30, 1987, Notice at 1). Fosco was given until August 15, 1987, to complete the rehabilitation.

On August 19, and September 29, 1987, further notices of noncompliance were issued. In the September 29 notice the District Ranger notified Fosco and Foster that he had "decided to do the necessary maintenance and erosion control work and attach your reclamation bond. Your BLM reclamation bond may also be attached" (Sept. 29, 1987, Notice at 1).

On November 24, 1987, the Forest Service submitted a statement to BLM. In its cover letter the Forest Service stated that:

As a result of Non[c]ompliance on both the Forest Service Operating Plan, dated January 14, 1987 and the BLM Mineral Lease #I-20528, dated December 1, 1985 and both issued to FOSCO Mining, Inc. it was necessary for a Forest Service road maintenance crew to do the minimum erosion control work necessary to protect the road from further damage. A Forest Service Reclamation Bond was attached and used in total for this work. This bill is for the balance of the maintenance costs to be assessed against FOSCO's BLM bond.

(Nov. 24, 1987, Letter). The amount billed to BLM was \$270.

A Notice of Noncompliance was issued by BLM on October 2, 1987. The stated reasons for noncompliance were failure to remove living facilities and failure to properly maintain the road. BLM gave 30 days for compliance and noted that "[f]ailure to take action \* \* \* shall be grounds for forfeiture of the performance bond."

On October 13, 1987, Foster responded to the BLM notice stating that neither he nor Fosco was in noncompliance with the prospecting permit, alleging abuse of process by the Forest Service, and stating that BLM should not become a party to the unlawful acts being committed by Forest Service personnel. On December 1, 1987, the prospecting permit expired.

On March 15, 1988, the Coeur d'Alene District Office, BLM, sent a letter to Foster noting the expiration of the prospecting permit. It also stated that Foster was

required to restore the surface of the permitted land and access road to their former condition and remove any structures, equipment, or trash (permit conditions, sec. 12). The reclamation will be completed as stated in your exploration plan which is part of your "Plan of Operations" approved January 14, 1987. \* \* \* [A]ll reclamation work will be completed by May 31, 1988. A final onsite inspection will be scheduled with you or your representatives to ensure compliance. Failure to properly reclaim the area shall be grounds for forfeiture of the performance bond as we advised you in the "Notice of Noncompliance" dated October 2, 1987.

(Mar. 15, 1988, Letter). On June 30, 1988, BLM notified the Forest Service that "[a]s a result of [Foster's] failure to reclaim the area disturbed under his prospecting permit \* \* \* [BLM was] initiating forfeiture of the permit bond."

On October 31, 1988, BLM issued its decision that the cash bond submitted on November 14, 1985, would be used to complete reclamation work not done by Foster, with any unused portion being refunded to Foster upon completion of the necessary work. Foster appealed from that decision.

In his statement of reasons Foster presents the history of the location of the mining claims, and formation of Fosco. He also presents a narrative of his efforts to gain financial assistance for his proposed mining venture and the difficulties he encountered. He explains that, upon finding that a portion of the land he had staked was acquired land, he sought a prospecting permit from BLM to protect Fosco's interest in the lands. When making the application he did not have certain of the corporate resolutions necessary for issuance of the permit to Fosco, and applied for the permit in his own name. <sup>3/</sup> After setting out a narrative of the events leading to the amendment and subsequent approval of the plan of operations, Foster explains that he was of the opinion that no bonding was required for the road, and that the bond was applicable only to the ponds he planned to construct on the property. Foster alleges that he is not the owner of the personal property and structures that he has personally been directed to move, and thus cannot legally comply with the directive.

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<sup>3/</sup> Foster noted that BLM personnel had advised him that Fosco's interest would be protected if the permit was taken out in his name. Foster now questions this advice, but we know of nothing that would have prevented his transferring the permit to Fosco. As long as the permit was in good standing no third party could obtain a permit to explore for the mineral stated in the permit. The BLM advice was sound.

[1] Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims. Ted Thompson, 98 IBLA 251 (1987). Foster obtained a prospecting permit because the lands in question had been acquired by the United States. The authority to grant prospecting permits is found at 43 CFR Part 3500, and the bonding requirements are found at 43 CFR Subpart 3504.

Foster furnished a cash bond which is specifically allowed under 43 CFR 3504.1-1(2). The bond amount, which is determined under 43 CFR 3504.2-1(a), provides that an applicant for a prospecting permit shall furnish a bond conditioned upon compliance with all terms and conditions of the prospecting permit. The bond must be in an amount determined by the authorized officer, but in no case less than \$1,000. Under 43 CFR 3570 (1985), a party holding a prospecting permit was required to conduct operations under the permit in compliance with the permit provisions, applicable regulations, and the terms and conditions of approved exploration or mining plans. In turn, under section 12 of the prospecting permit, Foster agreed

to take such reasonable steps as may be needed to prevent operations on the permitted lands from unnecessarily: (1) causing or contributing to soil erosion \* \* \* on Federal or non-Federal lands in the vicinity; (2) polluting air and water; (3) damaging improvements owned by the United States or other parties; or (4) \* \* \*; and upon \* \* \* expiration of this permit \* \* \* to fill any pits, ditches and other excavations, remove or cover all debris, and so far as reasonably possible, restore the surface of the permitted lands and access roads to their former condition \* \* \*.

(Prospecting Permit Application and Permit at Section 12). The stated purpose of the \$1,000 bond was to "insure surface and subsurface reclamation" (Hardrock Prospecting Permit Standard Stipulations at Section 1).

In its March 15, 1988, notice, BLM directed Foster to restore the surface of the permitted land and access road to their former condition and remove any structures, equipment, or trash. The enforcement of this requirement was clearly within the scope of BLM's authority and the permit requirements. Foster was given approximately 45 days to accomplish this goal, and did not seek a good-faith extension of time in which to do so. BLM could have taken action to remedy Foster's default on June 1, 1988. It did not and waited until October of that year to give notice of its intent to proceed with the reclamation activities and look to the cash bond for reimbursement of its expense. We find nothing in Foster's statement of reasons for appeal to cause us to reverse BLM's October 31, 1988, decision to undertake reclamation and seek reimbursement from the cash bond funds.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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R. W. Mullen  
Administrative Judge

I concur:

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Wm. Philip Horton  
Chief Administrative Judge